



# NOW WHAT?

## Duke Law Experts Discuss Rationale for War in Iraq, Consider World Wide Consequences

**I**n the spring of 2003, the United States took a major policy turn when it cited a right to pre-emptive self-defense as a rationale for going to war with Iraq. In the following discussion, two of the country's top experts on national security and international law – Duke Law professors Scott Silliman and Michael Byers – look back at justifications for the war and consider some of the potential consequences of political and strategic decisions. They also consider ramifications for the legal profession and Duke Law students.

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JUNE 24, 2003 BAGHDAD, IRAQ – IRAQI CHILDREN CARRY WATER FROM ONE OF THE FEW SPIGOTS WITH RUNNING WATER IN THEIR NEIGHBORHOOD IN AL RAHMANIA. SINCE THE END OF THE COALITION-LED WAR AGAINST IRAQ, IRAQI CITIZENS HAVE BEEN SUFFERING GRAVE SHORTAGES OF WATER AND ELECTRICITY

**Duke Law Magazine:** Much has been said of pre-emptive self-defense as a rationale for going to war. Is that the rationale the U.S. relied upon in Iraq, and, if so, how does that conform with current international law?

**Silliman:** I think that when we look at President Bush's speech of March 17, which was about 48 hours before the bombs started to drop in Baghdad, it was clear to me that the fundamental pillar, the predicate for the use of force by the United States, was pre-emptive self-defense. Interestingly, that is different as I see it from the position of the British, who obviously were our closest ally. The British believed very strongly that the use of force in disarmament was predicated upon Security Council Resolution 1441 and its predecessor resolutions 678 and 687, and that you could link those three (the latter two forming the basis for disarming Iraq in the first Gulf War) and justify the use of force without any further mandate from the Security Council. To some extent, every time President Bush started talking about regime change, you could see Tony Blair's knees knocking together, and that was particularly unhelpful as far as keeping the coalition together. It was, to my knowledge, the first test of this new concept – this new doctrine of pre-emptive self-defense – and I think the jury is still out as far as whether the international community

will accept its use in this instance or whether it will find a way to condemn it.

**Byers:** There is a sort of twist in the analysis that Scott's given that needs to be drawn out here, and that is how other countries respond to the intervention in Iraq. It's not simply a question of yes or no, but it's a question of, if yes, on what basis? Given that there are two legal justifications out there, the American justification and the British justification, this gives other countries the option of supporting the intervention in Iraq, but on a basis other than that advanced as the

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principal justification by the president. This option to go with the British justification means that even widespread support for the intervention in Iraq does not necessarily mean widespread support for

the president's doctrine of pre-emptive self-defense.

**Duke Law Magazine:** Given those responses, was this war legal in your view?

**Silliman:** Michael and I have both been asked on many occasions whether the war in Iraq was legal or not under international law, and, as he points out, because there are really two different positions that were advocated, the U.S. position and the British position, that is not an easy question to answer. I think it's easier to argue the linkage of the previous Security Council resolutions than it is to argue pre-emptive self-defense, simply because there has been no development of customary international law which can be used to support the U.S. position.

**Byers:** There is also the very real post-intervention aspect of the legal claim. The fact that there are two justifications out there means that what has been discovered or not discovered in Iraq in terms of weapons of mass destruction is going to push other countries into preferring one justification over the other in terms of their response to the U.S. The pre-emptive self-defense argument so far is looking pretty thin in factual terms. The U.S. and its allies have not found the weapons of mass destruction. Other countries are looking at this situation and saying, you told us there was an imminent threat and now we don't see it.

**Duke Law Magazine:** How did the decision to launch a war when other countries wanted more time to search for weapons of mass destruction affect the Security Council and, ultimately, the relationships among those countries?

**Byers:** The absence of any discovery of weapons of mass destruction indicates that the U.S. and the United Kingdom took far too much of a risk with the U.N. and the international legal system. They subjected the Security Council to that profound disagreement – that rupture among the permanent members – when there was no immediate need to do so. What we now know in retrospect is that the president

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and Prime Minister Blair were playing fast and loose with an institution that has served the international community very well for 58 years. And so the absence of any weapons of mass destruction discredits their policy positions.

**Silliman:** We are both aware of the “document” concerning the shipment of uranium to Iraq, which turned out to be not just a forgery but a fourth-rate forgery. The U.S. and Britain both claimed that the document was evidence of the expanding nuclear program in Iraq, and I think that damaged the credibility of both countries. We know that there are supposedly mobile labs that were uncovered, but there still has been no evidence that those labs were ever used to produce anything. So, the U.S. is still looking for a smoking gun to bolster its credibility.

**Byers:** I guess what I’m suggesting is that given the very evident threat that arises from the conjunction of terrorism, weapons of mass destruction, and rogue states, you want to have all of your allies pulling together. To alienate key allies like France and Germany for the sake of moving a few weeks or months earlier was too great a risk. There has been damage done to various alliances and to the international system. Had the president and prime minister been prepared to wait until May or June, we would have seen a cohesive group of countries and a cohesive Security Council behind them in disarming Iraq and removing Saddam Hussein.

**Duke Law Magazine:** What sort of repercussions might the United States and other countries face given what happened and what continues to unfold in Iraq, particularly given the U.S. justification for the war?

**Silliman:** If in fact nothing happens – there is no condemnation or criticism of what the U.S. did – then I think we have the situation where pre-emptive self-defense could conceivably become a part of the fabric of customary international law and a “tool” available to any country that desires to use it. In that event, there will no longer be an international arbitrator, like the United Nations Security Council under the traditional charter system, to make a judgment on the use of force by one country against another. Under pre-emptive self-defense, any country that believes itself threatened, even though the location of the target and the timing of the attack may yet be undetermined, could then respond with force against the threatening state. For instance, that could involve India and Pakistan, or North Korea and countries on the Asian peninsula.

**Byers:** Or what could potentially happen between the People’s Republic of China and Taiwan. Or what Russia might wish to do in Georgia. Or what might happen on



MICHAEL BYERS

the border of innumerable African or Latin American states. There is a real sense here that the dam has been broken on pre-emptive self-defense and that the consequences of that could be very widespread.

**Duke Law Magazine:** So this could prove to be a destabilizing moment in world history?

**Byers:** Which is why the British – the United States’ closest ally – chose not to embrace the pre-emptive self-defense argument. It said no, we don’t want to go there. We are with you, but we have a better argument that is more consistent with existing international law and the existing institutions.

**Silliman:** It is destabilizing when you consider that under the U.N. Charter, looked upon by many as the most current articulation of the rules governing when one state can use force against another, the Security Council has been the recognized arbiter. Now, under pre-emptive self-defense, each country makes its own determination. That takes us back to a time when there was no regulation of the international use of force. I think that the British are now urging the United States, in the strongest possible terms, to bring the Security Council back into the picture.

**Byers:** It’s important to stress at this point that the U.S. very much needs a strong international community that is cooperating with it because we are not simply talking about terrorism and weapons of mass destruction and rogue states. We are talking about the ability of countries to cooperate effectively on international epidemics like SARS. You need to have the cooperation of France, Germany, Russia and China if you are going to deal effectively with SARS. We are also dealing with issues of the international economy. We live in a very tightly integrated interdependent world. And military challenges are only one subset of the various profound challenges that face the U.S. and other countries.

**Duke Law Magazine:** This then goes well beyond a question of the use of military force?

**Silliman:** It cuts to the core of international relations because you are not just dealing with use of force issues here. You are talking about a fundamental question of unilateralism versus multilateralism, and this did not start with Iraq. You can go back to the mid-90s and see a very clear path that the United States has chosen with regard to a more unilateralist approach in international relations. You see this in our position not to join other countries in the Ottawa Land Mines Treaty, even though by executive order we were going to do many of the same things that were called for by the treaty, but on a slightly different timetable. Then you had the Rome Statute of the International Criminal Court, and there the U.S. joined such nontraditional political bedfellows as Iraq, Yemen, Libya and Qatar in voting against the treaty. The Kyoto Protocol on global warming is yet another example. The question now is what direction the United States will take in the future.

**Byers:** The most valuable diplomatic asset is not a strong military or even a strong economy. It is good will. And U.S. diplomats have to be able to go into negotiations with allies and non-allies around the world with a sense of good will being directed back towards them, so as to be able to persuade other countries to help the U.S. accomplish its goals. We need other countries. You cannot freeze financial assets in another country without the

cooperation of that country's government. You can't arrest drug suspects in another country without the cooperation of that government. You can't do a whole host of things that need to be done in our interdependent world unless people are willing to take the extra step because they like you. Now we are at this divide. Is the U.S. going to again be seen as a leader, as a country that other countries want to help, or is it going to slide into a country that is seen, rightly or wrongly, as a bully, as a unilateralist?

**“The price tag on rebuilding Iraq is incredibly high and needs to be shared by other countries besides the U.S. and Britain. To some extent, that’s why the role of the Security Council is so important right now.” –Scott Silliman**

**Silliman:** I tend to believe the Bush administration must examine its overall success rate in the war against terrorism. We have recently seen significant attacks in Morocco and Saudi Arabia and a rise in the threat level in the U.S. We are realizing that Al Qaeda is still very much capable of mounting major attacks against the U.S. and its interests. Going back to the question of unilateralism vs. multilateralism, the war on terrorism very much depends upon our working closely with the intelligence communities of moderate Arab states, even those with whom we might otherwise have disagreements. I think the administration is recognizing that. You have to rely on the intelligence sources and the police networks of these other countries to ferret out the terrorist cells, and to do that you need to have some kind of cooperative relationship with them.

**Duke Law Magazine:** Would you both comment on the legal authority or responsibility that the U.S. now has in the rebuilding of Iraq?

**Byers:** It started off very badly and the first effort at administering post-war Iraq has been abruptly replaced by a new effort – a more state department- and less Pentagon-oriented effort. But the question of administering post-war Iraq is one that I think would ideally be given to the U.N., which has a wealth of expertise with regard to post-conflict administration. And yet it is quite clear that the U.N. will not be given the lead role. It will be given a parallel and likely subsidiary role. And so what we have at the moment is the U.S. trying to do the job and learning by making mistakes. This is a catastrophe, not for the U.S. necessarily, but for the people of Iraq, because they are being experimented upon by these administrators who don't know what they are doing. The other issue that comes up here is what can be done about controlling the resources of Iraq. And here we are entering into very controversial territory because the U.S. and the U.K. are relying upon the 1907 Hague Convention with regard to the resources of occupied territory. We are relying upon a body of law that is almost a century old and predates the U.N. by almost four decades.

**Silliman:** You do have a provision in the Fourth Geneva Convention of 1949 that allows for the resources of a country, such as oil revenues, to be used by the occupation forces, but solely for the rebuilding of the infrastructure.

**Duke Law Magazine:** So you see serious problems with the initial steps toward rebuilding?

**Byers:** The U.S. military does not specialize in peacekeeping, in policing, in civilian control. It's a war-fighting military. Other countries emphasize the peace-keeping in their equipment and in their training. And you could have structured an intervention in Iraq that would have seen the war-fighting troops on the front line



SCOTT SILLIMAN

backed up by a peacekeeping policing force that was ready to go in fairly quickly with the support of the U.N. And again, I think part of what happened was that there was a rush to intervene that not only resulted in the deadlock in the Security Council, but also in an absence of that supporting collection of forces.

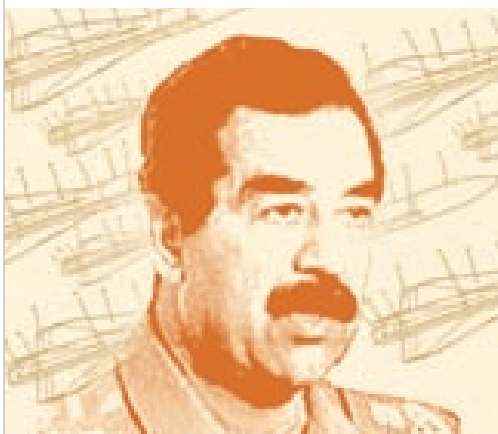
**Silliman:** I agree, but you can't go back and remake the decision in the Security Council with regard to the use-of-force resolution that would have molded all this together. Looking forward, I think what's crucial now is the question of cost. The price tag on rebuilding Iraq is incredibly high and needs to be shared by other countries besides the U.S. and Britain. To some extent, that's why the role of the Security Council is so important right now. You need not only to have access to the oil revenue to allow that to be poured back into rebuilding the infrastructure, but you need to be able to bring in weapons inspectors and allow for those countries who are better versed in peacekeeping, such as Canada and Poland, to provide troops to maintain some kind of stability in Iraq. The U.S., in making some concessions in the recent debate in the Council, perhaps acknowledged that there are some things it cannot do as well as a coalition of countries.

**Byers:** There is also a lesson here for the future in terms of other so-called rogue states. The U.S. could easily remove the governing regime in Syria. It would be more difficult, but it also could remove the governing regime in Iran. It would be even more difficult, but still possible, to remove the regime in North Korea. But the military removal of a regime is just step one. And even though the U.S. has the military power to accomplish those tasks, I think the administration is starting to recalculate the previously unforeseen costs of what you do afterwards and the absolute importance of international cooperation after the conflict.

**Silliman:** It's clear that the administration, and most people in the country, now realize that military force is only one component of national power when deal-

ing with international relations. There needs to be a complementary rebuilding component which follows on. This is where Colin Powell is very important, because as secretary of state and a former chairman of the Joint Chiefs of Staff, he well understands what can be gained through the use of military force, as well as its inherent limitations. He further recognizes that, to a large extent, you must rely on your international partners to complete the job of rebuilding a country after a particular regime has been toppled.

**Duke Law Magazine:** What are the prospects for democracy emerging in Iraq?



**Silliman:** I'm not sure there is a legal right to impose a democratic regime through the use of force. Further, I'm not sure that it will necessarily work in that particular culture. Going back to Michael's earlier point, it would be far easier for the U.N., in a more robust role than so far has been envisioned for it, to go in and work with the Iraqi people to try to create a regime of whatever sort that will in fact bring stability to that country and, through that country, to the entire region. That may or may not be a democratic regime.

**Byers:** Democracy is a dangerous word to use in the context of military interventions. I think it's possible in Iraq that, given the free choice in an election, the Iraqi people might actually elect an Islamic fundamentalist regime that was

committed to never holding another election. What do we do in that scenario? This, you will remember, is what happened in Algeria. We need to be careful about using the language of democracy in these instances.

**Silliman:** That is not to say that we shouldn't have a long-term goal of having democratic regimes throughout the Middle East, but to get there you may need to go through transitional governments of different types. We saw the same thing in the Soviet Union when it collapsed. We might see it in Iraq and Afghanistan. It may take a series of transitional governments before you eventually have a democratic regime.

**Byers:** Perhaps more important than democracy, at least in the near future, is encouraging respect for human rights. A stable non-democratic country that respects the basic human rights of its citizens is still a lot better than what we've had in many countries in the Middle East. Encouraging these countries not to torture their citizens, not to detain them without charge, not to persecute people because of their religion or political beliefs is more important than democracy as a short-term goal. And in that context, the U.S. has a long history that it can draw on as a model of what respect for civil liberties can do. At the same time, with respect to civil liberties, we actually are making compromises within this country that don't send the most positive messages – for instance, how we are treating detainees at Guantanamo. We might or might not be doing it correctly, but the message we are sending to the world is that the U.S. does not respect human rights.

**Silliman:** We must distinguish between the concept of democracy as we know it in this country and self-determination. One could make a plausible argument that under the U.N. Charter there may be the seeds of a right to self-determination. But self-determination could result in exactly what Michael was describing in Algeria, that a people can determine their own form of government, which may or may not be democratic. So to say that

the people of Iraq should be able to determine their own form of government is not also to say that it should be a democratic regime.

**Byers:** The U.S. has been successful in promoting democracy worldwide. The number of democratic countries in the world has increased dramatically in the course of the last 25 years. But it wasn't done at the point of a gun. It was done through incentives of access to the U.S. market and through the moral and economic support of people committed to change. That is the sort of approach that needs to be taken in a place like the Middle East.

**Duke Law Magazine:** As a law school and legal community, what does all this mean for us?

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**Silliman:** I can't think of a more exciting time to be a student or teacher of international law, international relations or national security law. But that excitement is understandably mixed with a bit of anxiety out of concern for what the future holds, not just for this country, but for the global community as well. For our students at Duke Law School, this is an opportunity to deal with some unique and timely issues — questions of law and policy that are necessarily ambiguous and for which there may be no easily discernable right or wrong answers. As with so many other things, we may have to await history's final judgment.

**Byers:** I think it's more than an opportunity for young American lawyers and law students. It's almost a responsibility. The United States is very much a leader as the most powerful country economically and militarily. It simply isn't an option to pretend that the rest of the world isn't there. In everything that we do there will be an international ramification. In everything that other people and other countries are doing, the same will be true here. Much of this increasingly involves law. We have been talking primarily about the law governing military force, but it could be the law governing international trading relations or international health care issues. So for young lawyers in the U.S. today, if they want to fulfill a role as leaders, as people who are charting the future for their country, this is a key area of expertise. Duke Law students are fully capable of rising to that challenge. They are as able as anyone in the world to grapple with this complexity and to sort out the ambiguity and to help chart a course forward. Quite frankly I don't think international law is optional anymore. For the serious student who wants to be a player in making this country and this world a better place, international law, national security law and international trade are essentially required courses. In this interdependent world, you are going to rub up against international law every day of every month of your career. ♡

For more information about Professors Byers, Horowitz and Silliman, visit faculty profiles at [www.law.duke.edu/fac/index.html](http://www.law.duke.edu/fac/index.html)

## Rebuilding Iraq and Afghanistan: Horowitz Sees Tasks of Great Complexity

**I**n a country as heterogeneous as Iraq, building a new nation in the aftermath of the U.S.-led war will be more complex and dangerous than most people realize, says Duke Law Professor Donald Horowitz, a leading expert on ethnic conflict.

“It's much more complex than the press reports,” said Horowitz, the James B. Duke professor of law and political science. For example, he noted, not all of the population in northern Iraq is Kurdish, adding that the Kurds themselves are divided. In fact, most ethnic groups in Iraq, whether relatively large or small in number, are made up of politically disparate subgroups.

Horowitz has been consulted on constitutional and ethnic conflict issues in countries around the world, including Nigeria, Indonesia, Bosnia, Fiji and Afghanistan. An often-cited expert, he is the author of more than 50 articles and eight books. This fall, he is teaching a class called comparative constitutional design that focuses on configurations of political institutions that might be useful for democratizing countries, especially those divided by ethnic or religious affiliations.

“In recent decades, constitution-making has become a much more international and comparative exercise than it